No. 97-679

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE CO.,

Respondent.

Supreme Court, U.S.
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On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE, THE BANKERS CLEARING HOUSE, THE NEW YORK CLEARING HOUSE ASSOCIATION, ALLIED SIGNAL, INC., AMERICAN INTERNATIONAL GROUP, INC., THE BANK OF NEW YORK, BANKAMERICA CORPORATION, CITIBANK, N.A., FIRST DATA CORPORATION, FORD MOTOR COMPANY, HONEYWELL INC., HYATT CORPORATION, MARINE MIDLAND BANK, MICROSOFT CORPORATION, THE ONLINE COMPUTER LIBRARY CENTER (OCLC), THE SABRE GROUP, INC., THOMPSON & COMPANY, UNITED PARCEL SERVICE (UPS), UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA), VISA INTERNATIONAL SERVICE ASSOCIATION, INC., WAL-MART STORES, INC. AND WORLDSPAN SERVICES LIMITED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* *

This case raises several issues of critical importance to large customers in the enormous and rapidly growing market for interstate telecommunications services. First, what is the scope of the statutory requirement that carriers tariff the "classification, practices, and regulations affecting [their] charges"? Second, how are the courts and regulators to deal with efforts by carriers and their customers to address service-related matters that fall *outside* the scope of the tariffing requirement? Third, does the filed rate doctrine as embodied in Section 203(c) of the Communications Act of 1934 (the "Act") preclude a carrier's customers from availing themselves of state law remedies with respect to such non-rate-affecting terms?

For over a decade, agreements between the major providers of interstate and international interexchange services and their large customers have had three components: (a) the general terms of the applicable carrier tariffs; (b) customer-specific tariff "options"; and (c) contracts, which may vary from a two-page order form to 50-100 pages of text and lengthy technical appendices.

The rate-related terms of these arrangements are filed with the Federal Communications Commission (the "Commission" or "FCC"), either in the carrier's general tariffs or in customer-specific tariff "options," which are available to similarly situated customers. The carriers uniformly resist including *non*-rate-related terms in their tariffs, and these are therefore found principally in the contracts. The Commission has found that customer-specific arrangements structured in this manner are consistent with the purposes of the Communications Act and are not unlawfully dis-

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* Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

criminatory. That determination has been upheld by the courts.[1]

By urging a broad reading of the phrase "affecting charges" as it is used in Section 203(c) of the Act, Petitioner AT&T Corp. ("AT&T") seeks to re-write the statute's tariffing provisions to cover things that Congress expressly chose *not* to cover. If AT&T's reading is adopted by this Court, many of the untariffed provisions of its own (and its competitors') contracts could be nullified, releasing the carriers from obligations that they freely assumed and depriving their customers of significant benefits attained through competitive bidding and hard-fought negotiation.

Amici are large users of the telecommunications services of the major interexchange carriers (AT&T, MCI and Sprint) and organizations of such users. The Ad Hoc Telecommunications Users Committee is an unincorporated association whose members include the nation's largest business users of telecommunications services and products; the organization represents its members' interests in telecommunications matters before the Commission and in the federal courts. The Bankers Clearing House and the New York Clearing House Association are associations of leading banks in California and New York, respectively. They serve as clearinghouses through which their members settle accounts and present checks and other payment instruments; they also represent their members on issues of common concern before the Commission and in the courts. Allied Signal, Inc. is an advanced technology and manufacturing company serving customers worldwide with aerospace and automotive products, chemicals, fibers, plastics and other advanced materials. American International Group, Inc. is a U.S.-based international insurance organization and among the largest underwriters of commercial and industrial coverages in the United States. The Bank of New York is one of the oldest banks in the

[1] *Competitive Telecom. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("[S]o far as 'unreasonable discrimination' is concerned, an apple does not have to be priced the same as an orange."). *See Sea-Land Svc. Inc. v. ICC*, 783 F.2d 1311, 1317 (D.C. Cir. 1984).

nation, offering banking and other financial services to corporations, businesses and individuals worldwide. BankAmerica Corporation provides financial products and services to individuals, corporations, small- and mid-sized businesses, government agencies and financial institutions throughout the world; it is the nation's second largest banking company based upon market capitalization at the close of 1997. Citibank, N.A. offers personal, corporate, business, professional and international banking and credit card services to millions of consumers throughout the world. First Data Corporation is a provider of credit card processing, payment systems, electronic commerce and information-based services to businesses and consumers in over 140 countries. Ford Motor Company is a global automotive manufacturing concern with customers in 200 countries and territories, 370,000 employees and annual sales in excess of $150 billion; subsidiaries include financial services and car rental operations. Honeywell Inc. supplies security, safety, energy efficiency and environmental control technology for home, building and industrial use and for the aviation and space markets; it employs 57,500 people in 95 countries and had sales of $8 billion in 1997. Hyatt Corporation manages, operates, leases and franchises hotels and resorts in the United States, Canada and the Caribbean. Marine Midland Bank, a subsidiary of HSBC Americas, Inc., is a New York State regional banking institution that serves individuals and business customers. Microsoft Corporation is engaged in the development and marketing of software products and services; it employs an array of telecommunications services to support its corporate communications worldwide. The Online Computer Library Center (OCLC) is a nonprofit, membership library, computer service and research organization whose networks and services link more than 25,000 libraries in the U.S. and 63 countries and territories. The SABRE Group, Inc. is a leader in the electronic distribution of travel-related products and services and a provider of information technology solutions for the travel and transportation industry. Thompson & Company is a na-

tionwide mail order catalog company specializing in cigar products; its affiliates specialize in catalog sales of gifts and linens. United Parcel Service (UPS) is the world's largest package distribution company, providing delivery and information-based services in more than 200 countries and territories; UPS and its technology and logistics subsidiaries employ more than 338,000 people and have revenues in excess of $22 billion. United Services Automobile Association (USAA) is a worldwide insurance and diversified financial services company serving more than three million customers, primarily members of the U.S. military and their families. VISA International Service Association, Inc. is an association of financial institutions that use the VISA service mark in connection with payment systems (including debit and credit cards), check authorizations, automated teller machines and related services. Wal-Mart Stores, Inc. employs more than 720,000 associates at its more than 2,300 stores and 440 Sam's Club membership warehouses within the United States; over 105,000 people are also employed in Argentina, Brazil, Canada, China, Germany, Indonesia, Mexico and Puerto Rico. WorldSpan Services Limited operates a computer reservations system that provides travel information to airlines, hotels, car rental companies and travel agents, servicing over 18,000 subscribers worldwide.

Amici (and their members, in the case of associations) have entered into multi-year, multi-million-dollar service agreements with one or more interexchange carriers. They have a keen interest in the enforceability of these agreements, including the terms that do not affect rates but are nevertheless an integral part of their service arrangements. *Amici* fear that a broad reading of Section 203(c) of the Act could nullify many of the untariffed provisions of customer/carrier contracts, calling into question one of the principal benefits of competition in the interexchange market. *Amici* submit this brief in order to discuss the scope of the filed rate doctrine as applied to such agreements from a perspective shared by neither Petitioner nor Respondent.[2]

STATEMENT OF THE CASE

Until the mid-1980's, even the largest corporations met their telecommunications needs by purchasing services at the prices (and on the terms) contained in "standard" tariffs filed by carriers with the Commission. Prompted by a series of FCC rulings relieving them of the burden of filing tariffs, newly emergent interexchange carriers (notably MCI and Sprint) began to offer service to large business users pursuant to individually negotiated contracts.[3] In 1987, AT&T began to negotiate customized service arrangements with its customers in order to meet this competitive challenge. Because the Commission's policies required AT&T to tariff its interstate telecommunications services, AT&T incorporated the rates and rate-affecting provisions of these arrangements into customer-specific tariffs, initially filed as "options" under its Tariff F.C.C. No. 12 (which was designed for this purpose), and later in "contract tariffs."[4] When the Commission's detariffing

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[2] *Amici* have secured the consent of both Petitioner and Respondent to the filing of this brief. Copies of letters granting consent are being filed herewith.

[3] *See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor*, Fourth Report and Order, 95 F.C.C.2d 554 (1983) (relieving "non-dominant" carriers of the obligation to file tariffs). The courts' doubts concerning the Commission's authority to waive the Act's filing requirement culminated in *MCI Telecom. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

[4] The Commission rejected legal challenges to AT&T's Tariff 12, holding that it did not violate the Act's prohibition on unreasonable discrimination so long as each offering was made available to similarly situated customers. *AT&T Communications*, 6 F.C.C.R. 7039 (1991), *aff'd sub nom. Competitive Telecom. Ass'n v. FCC*, *supra* note 1. The Commission later authorized AT&T and other interexchange carriers to file so-called "contract tariffs." *Competition in the Interstate, Interexchange Marketplace*, Report and Order, 6 F.C.C.R. 5880, 5911 (1991) (*"Interexchange Competition Order"*).

policies for AT&T's competitors were struck down by the courts,[5] those carriers also began filing customer-specific tariffs.

Today, most large users solicit bids from one or more carriers (either informally or by means of a detailed "request for proposals"), work with the bidders to improve their offers, and award the business based upon an analysis of the "best and final" offer of each and only after extensive negotiations. The competition is often heated, yielding competitive prices and hitherto unavailable features designed to meet the needs of individual customers. By the end of 1997, AT&T had nearly 9,000 customized tariff arrangements on file with the Commission; MCI and Sprint had 9,000 more between them. Negotiated service arrangements are the most competitive segment of the interstate interexchange market.[6]

The Commission has adapted its regulatory policies to these market realities, streamlining the tariff process and ruling that customized arrangements do not offend the Act's prohibition on unjust or unreasonable discrimination so long as they are made generally available to similarly situated customers. The agency took these steps to encourage carriers to meet the needs of business customers "competing actively in the increasingly globalized and increasingly information-based world economy."[7] Most recently the Commission, acting on authority granted by Congress in its 1996 amendments to the Act, eliminated the tariff filing requirement for domestic interexchange services.[8]

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[5] *See* note 3, *supra*.

[6] *See Interexchange Competition Order* at 5887; *Competition in the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 F.C.C.R. 2627, 2634-35 (1990) (*"Interexchange Competition NPRM"*).

[7] *Interexchange Competition NPRM*, at 2641.

[8] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 F.C.C.R. 20730 (1996) (*"Detariffing Order"*); *recon.*, 1997 FCC LEXIS 4453 (*"Detariffing Reconsideration Order"*), *stay issued and appeal docketed sub nom. MCI Telecom. Corp. v. FCC*, Case No. 96-1459 (D.C. Cir.).

SUMMARY OF ARGUMENT

The Court should decline the invitation to expand the filed rate doctrine beyond the limits set by Congress in the Communications Act. The Act requires AT&T to tariff its rates and rate-affecting terms for interstate and international telecommunications service, and requires AT&T to adhere to those terms. But the Act does *not* require AT&T to tariff terms that are not rate-affecting, even if they are material to a carrier's relationship with a customer. Indeed, Congress made clear in recent amendments to the Act that it does not view as central to the purposes of the Act the filing of tariffs for rates or rate-related terms, let alone the tariffing of all manner of non-rate-affecting terms.

AT&T's statements to the Commission and its business practices are inconsistent with the position that it advocates in this case. In 1990, AT&T successfully argued to the Commission that the Act does not require it to tariff contractual provisions that do not affect its rates. It cited as examples of such provisions implementation plans and billing requirements, the very matters at the heart of its dispute with Respondent. (The Commission agreed, and limited its new rules for customer-specific tariffs to volume, term and discount requirements and other terms of service that affect the charges paid by customers.) More recently, AT&T has told the Commission that provisions that are not required to be tariffed are not subject to the filed rate doctrine.

Over the years, the Commission has given AT&T and its competitors the flexibility to offer attractive rates, terms and conditions to business users in return for significant volume and term commitments and costly penalties for early termination. The rates and rate-affecting terms are tariffed, but many non-rate-affecting terms that

are integral to implementing and maintaining the services described in the tariff are not. These provisions are of value to the customer and often impose costs on the carrier but, because the market for business services is highly competive, increases in vendor costs do not necessarily translate into increases in customer charges. In other words, a feature or term that is valuable and/or cost-affecting is not always rate-affecting.

AT&T's practice of not tariffing many negotiated terms is fully consistent with the Act, which requires the filing of only rates and rate-affecting provisions. AT&T's argument in this case—that the Act requires it to tariff any term that imparts value to customers and imposes costs on AT&T—is not consistent with the Act and, if adopted by the Court, could substantially disrupt the telecommunications marketplace.

ARGUMENT

I. The Filed Rate Doctrine Should Be Construed In Accordance With The Text Of The Communications Act.

The filed rate doctrine spelled out in Section 203(c) of the Communications Act is a corollary of the tariff-filing requirement of Section 203(a). Both provisions are limited to a carrier's charges and the terms and conditions "affecting such charges." To apply these requirements to *all* terms and conditions of service would be to read the limiting phrase out of the statute, in contravention of this Court's articulated approach to statutory interpretation.[9]

A. *The Filed Rate Doctrine Pertains Only To Rates And Rate-Affecting Terms.*

AT&T's Brief (at p. 4) sets out the relevant statutory provisions, but glosses over a critical difference between Sections 201 and 202 of the Act on the one hand and

[9] Statutory language is not to be presumed to be meaningless "surplusage." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995). Thus, where Congress has designated certain items as the subject of a statute, the inference to be drawn is that items not so designated were intended to be excluded. *Ex parte McCardle*, 7 Wall (74 U.S.) 506 (1868).

Section 203 on the other. Section 201(b) requires a carrier's "charges, practices, classifications, and regulations" to be "just and reasonable." There is no limitation on the practices, classifications or regulations that are subject to this standard. 47 U.S.C. § 201(b). Section 202(a) prohibits carriers from unjustly or unreasonably discriminating in connection with "charges, practices, classifications, regulations, facilities, or services" for "like" communications services. 47 U.S.C. § 202(a). Again, there are no limitations on the practices, classifications, regulations, facilities, or services that are subject to this prohibition.

In contrast, Section 203(a) requires carriers to file tariffs showing only their "charges [and the] . . . classifications, practices, and regulations *affecting such charges.*" Similarly, Section 203(c) makes it unlawful for a carrier to "charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in" its tariffs, or to "employ or enforce any classifications, regulations, or practices *affecting such charges,* except as specified in its tariffs. 47 U.S.C. §§ 203(a), (c).

In short, the Act imposes the just and reasonable standard and the anti-discrimination obligation on all classifications, practices and regulations, but Section 203's tariff-filing requirement and the filed rate doctrine apply only to those charges and classifications, practices, and regulations that affect a carrier's charges. The Commission has implemented Section 203 by adopting rules that require interexchange carriers to include the following in their tariffs for customer-specific offerings: the term of the contract (including any renewal options), a brief description of services provided, minimum volume requirements, the contract price for each service, a geenral description of any volume requirements, the contract price for each service, a general description of any volume discounts built into the contract rate structure, and "a general description of other classifications, practices and regulations affecting the contract rate." 47 C.F.R. § 61.55(c).

AT&T's argument is fundamentally flawed in that it erroneously assumes that all tariff-based statutes are identical, and that the filed rate doctrine must therefore be applied in the same manner in all regimes. Most of the cases cited by AT&T concern statutes (notably the Interstate Commerce Act or "ICA") whose language was significantly broader than Section 203(c) of the Act when the cases relied upon by AT&T were decided.[10] *Compare* 47 U.S.C. § 203(a) (carriers shall file "schedules showing all charges . . . and . . . the classifications, practices, and regulations *affecting such charges*") *with* § 6 of the ICA:

> [tariffs] shall show[] all the rates, fares, and charges for transportation[11] . . . . and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations *which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered* to the passenger, shipper, or consignee.

34 Stat. 584 (1914) (repealed 1997), *quoted in Southern Ry. v. Prescott*, 240 U.S. 632, 637 (emphasis added); *Boston and Maine R.R. v. Hooker*, 233 U.S. 97, 114-15 (1916). The ICA's tariffing requirement for common carrier regulations and practices—and its corollary, the filed rate doctrine—were obviously broader than those in the Communications Act. In particular, they were not

[10] AT&T asserts that case law applying the ICA is applicable because the legislative history of the Communications Act states that § 203 was "copied" from the earlier statute. Pet'r Br. at p. 23 n.18. The argument goes too far if it asks the Court to ignore unambiguous differences in the language of the two statutes.

[11] "Transportation" was a term of art under the ICA, and included "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property trasported." *Southern Ry. v. Prescott*, 240 U.S. 632, 637 (1916). "Communications" has not been given so expansive an interpretation under the Communications Act. *See* note 30, *infra*.

limited to rate-affecting provisions. Petitioner's heavy reliance on cases interpreting the ICA is misplaced.[12]

AT&T's argument loses much of its force once it is stripped of inapposite authority. For example, AT&T cites *Prescott*, 240 U.S. at 638, for the proposition that the filed rate doctrine applies not only to rates, but to *any* of the services within the purview of the relevant statute. Pet'r Br. at p. 27. But *Prescott*, which involved Sections 1 and 6 of the ICA, sheds no light on the scope of the Communications Act, because, as discussed above, the tariffing requirements of the two statutes are different.[13] *See also Boston & Maine R.R. v. Hooker*, 233 U.S. at 114-15 (addressing scope of tariffing provision of § 6 of the ICA).

AT&T concedes that the filed rate doctrine applies only to charges and terms "affecting . . . charges." Pet'r Br. at p. 26. But *Amici* and AT&T disagree over the meaning of the phrase "affecting such charges." To *Amici*, a term or condition affects charges if it establishes what charge will be applied, under what circumstances a charge will be applied or waived, or how a charge will be calculated.[14] A

[12] *See also Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 382 F.2d 466, 476 (5th Cir. 1967) (Federal Aviation Act (based on the ICA) requires air carriers' tariffs to show "all rates, fares, and charges for air transportation . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation.").

[13] The ICA differed from the Communications Act in that "the entire body of . . . services should be included under the single [statutorily-defined] term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like." 240 U.S. at 638. That is not the case under the Communications Act's more limited requirements.

[14] The first category might include provisions making the customer eligible for a discount from, or waiver of, certain charges. An example of the second would be a provision establishing an early termination charge and setting out the grounds on which a customer may terminate early without liability for that charge. The third category would include a provision stating that all calls will be

practice, classification or regulation does not affect charges unless it determines what (or under what circumstances) the customer must pay.

AT&T appears to advocate a much broader interpretation.[15] Under this view, tariffs are seen as the "core" or "heart" of the statutory scheme enacted by Congress to prevent discrimination. In order to prevent circumvention of that scheme, the rights of the parties "as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."[16] Although AT&T suggests that the filed rate doctrine does not encompass all aspects of the carrier/customer relationship, Pet'r Br. at p. 35, it also states that the doctrine applies to any provision that affects the value received by the customer and the costs incurred by the carrier. Pet'r. Br. at p. 28.[17] As the

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rounded up to the next full minute for purposes of applying per-minute charges.

[15] For example, Petitioner asserts that the filed rate doctrine "operates as a strict rule against the use of 'parol evidence' and alleged side agreements," Pet'r Br. at 25. This misstates the parol evidence rule and would read into tariffs a merger clause that would bar agreements on non-rate-related matters, which do not have to be tariffed in the first place. The applicabiilty of the parol evidence rule to agreements about non-tariff issues depends on whether the agreement is a total integration and whether it includes a merger clause. *See, e.g., International Telecom. Exchange Corp. v. MCI Telecom. Corp.*, 892 F. Supp. 1520, 1537 (N.D. Ga. 1995) (merger clause barred parol evidence of communications contract incorporating a tariff).

[16] Pet'r Br. at pp. 25, 28, quoting *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) and *Chicago & Altoa R.R. v. Kirby*, 225 U.S. 155 (1912).

[17] AT&T's Petition for *Certiorari* (at p. 13) stated that "the tariff describes the entirety of the legal relationship between the carrier and customer, and its terms 'are conclusive as to the rights of the parties.'" The United States Telephone Association and others, filing as *amici curiae* in support of AT&T, endorse that view, stating that "a carrier's obligations to its customers are governed *exclusively* by the terms of its filed tariffs." Brief *Amici Curiae* of the United States Telephone Association *et al.* at p. 3 (emphasis added) ("USTA Br.").

foregoing discussion demonstrates, this formulation of the doctrine is at odds with the text of Section 203(c) and rests upon case law interpreting the ICA's different (and markedly broader) regulatory regime.

B. *Congress Has Determined That Tariffs Are* Not *The Linchpin Of The Regulatory Regime Established By The Act.*

In *MCI Telecom. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994), the Court voided the FCC's effort to eliminate tariff filings, finding that it

> greatly undervalues the importance of the [tariff] filing requirement itself. . . The tariff filing requirement is . . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model . . . this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . As the *Maislin* court concluded, compliance with these provisions is 'utterly central' to the administration of the Act. . . . What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[18]

The broad definition of "rate affecting" endorsed by Judge Brunetti's dissent below and advanced by AT&T here flows directly from that view of the "scheme of rate regulation." The Court advised those (including the Commission) who wished to modify or eliminate the Act's tariff-filing requirements to address their concerns to Con-

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[18] 512 U.S. at 229-232. The Court expressed the view that, while eliminating the tariff filing requirement would not necessarily frustrate the ultimate purposes of the Act, "we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed for the pursuit of those purposes." 512 U.S. at 231 n.4.

gress.[19] They did, and Congress responded in 1996 by directing the FCC to forbear from applying any provision of the Communications Act, including the tariff-filing requirement of Section 203(a), if certain conditions are met.[20] In granting the FCC forbearance authority, Congress necessarily concluded that the tariff-filing requirement is not "essential to the ultimate purposes of the Act."

The Commission promptly sought to exercise its new authority by taking steps to eliminate tariffs—in no small part to end carrier abuse of the filed rate doctrine.[21] In its order requiring non-dominant carriers to withdraw their tariffs for domestic services, the Commission spelled out the ways in which regulators and aggrieved parties can determine whether a carrier has engaged in unreasonable discrimination or unjust and unreasonable conduct without consulting the carrier's filed tariff.[22]

Although the Commission's efforts to eliminate tariffs in competitive telecommunications markets have not yet taken effect,[23] it can no longer be argued that the filed

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[19] 512 U.S. at 232-34.

[20] Telecommunications Act of 1996, § 401, codified at 47 U.S.C. § 160. Although the forbearance authority granted to the Commission under the Telecommunications Act of 1996 is not limited to the Act's tariff-filing requirement, no one disputes that this was its intended target. *See* Pet'r Br. at p. 24 n.20; USTA Br. at p. 10.

[21] *See* Section III.A, below.

[22] The Commission found that market forces will likely deter unreasonable discrimination and unjust or unreasonable practices. It also noted that carriers must provide detailed price and service information to the Commission on request, and that private parties who believe they are the victims of discrimination may seek redress under the agency's complaint process (which makes provision for discovery). *Detariffing Reconsideration Order* at ¶ 68 & n.210.

[23] The major interexchange carriers believe that Section 401 of the Telecommunications Act of 1996 requires the Commission to allow them to file tariffs if they wish to do so, and have appealed the *Detariffing Order*. *See* note 8, *supra*.

rate doctrine is an essential component—much less the "heart"—of the telecommunications regulatory regime. Whether or not the 1996 amendments to the Act authorized the Commission to *require* carriers to withdraw their tariffs, it cannot be denied that Congress has authorized the Commission to *permit* carriers to do so. And as AT&T told the Commission, once the tariff-filing requirement is eliminated, "[v]alid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts." According to AT&T, "[t]he sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory," and where tariff filings are not mandatory, "the filed rate doctrine does not apply."[24]

It is worth noting that Congress's grant of forbearance authority and the FCC's efforts to act on that authority do not represent a radical break from prior policy trends but rather an extension of them.[25] New interexchange tariffs and tariff modifications may now be filed at 5:30 p.m. to take effect six-and-a-half hours later, with no advance review by the agency and no opportunity for a private party to seek an order that would prevent the tariff from taking effect. 47 C.F.R. § 61.23(c). The summary nature of the process reflects the conclusion reached by the

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[24] Letter from J. Argentieri, Government Affairs Director, AT&T Corp. to W.F. Caton, Acting Secretary, FCC (Dec. 19, 1996) (ex parte filing). A copy of that letter is attached to this brief as Appendix A.

[25] Nearly 20 years ago, the Commission began to eliminate or streamline tariff-filing requirements for "non-dominant" carriers (*i.e.*, those that lack market power) otherwise subject to the Act. *See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Common Carrier Services*, First Report and Order, 85 F.C.C.2d 1 (1980). It streamlined AT&T's tariff-filing obligations in 1991. *Interexchange Competition Order*, 6 F.C.C.R. at 5895 (shortening the public notice period and eliminating lengthy cost support). The Commission later declared AT&T non-dominant, thus making its filings presumptively lawful. *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 F.C.C.R. 3271 (1995).

Commission long ago that tariffs are not essential to the operation of the regulatory regime in competitive segments of the telecommunications industry.

II. AT&T's View Of The Filed Rate Doctrine Is At Odds With The Manner In Which It Conducts Its Business And Its Positions Before The Federal Communications Commission.

As noted above, AT&T argues that any contract clause that provides value to the customer or imposes a cost on the carrier "affects" charges for service and is therefore not enforceable unless filed in the carrier's tariff. Pet'r Br. at p. 28. But AT&T's conduct in the marketplace and its positions before the Commission are at odds with the broad view of the filed rate doctrine that it espouses here. Like the carrier in *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431, 442 (1994), AT&T "cannot have it both ways."

A. *The Major Carriers Negotiate Non-Rate-Affecting Contract Terms That Address Important Issues And Are (Correctly) Not Filed In Their Tariffs.*

The business relationships between a carrier and its large customers are highly complex. Marketed by the carriers as "strategic partnerships," network service agreements involve substantial undertakings by both parties in a variety of areas over long periods of time.[26] Managers responsible for the procurement, installation, maintenance and operation of business networks know that tariffs cannot exclusively govern the relationship between the carrier and the customer, because tariffs simply do not address non-rate-affecting but nonetheless crucial operational, technical and legal issues. Congress wrote a regulatory statute for telecommunications, not a manual for installing and maintaining high-volume call centers and sophisticated data networks, and carriers and their customers need to

[26] Although most contracts have terms of 3-5 years, they are periodically renegotiated and extended. Some of the *Amici* are taking service under terms and conditions (but not prices) negotiated nearly a decade ago.

make agreements about details that have nothing to do with the rate-affecting terms contained in the tariffs.

AT&T implicitly concedes that carrier undertakings for which no separate charge is imposed do not have to be tariffed—*i.e.*, do not "affect[] . . . charges" for purposes of Section 203.[27] That concession is consistent with, but only begins to describe, how AT&T and other carriers actually operate in the market.

AT&T's Tariff F.C.C. No. 12 is one of several vehicles under which it provides comprehensive service arrangements to its largest customers. When its competitors challenged the lawfulness of the offering several years ago, AT&T submitted an affidavit from Dennis Lewis, AT&T's Director of Marketing for Business Communications Services, concerning the competitive environment facing his employer. Mr. Lewis described the kinds of assistance that large corporate users require of their carriers: [28]

[27] AT&T makes this concession in connection with the billing options available to SDN customers. If a customer chooses "network billing," AT&T renders a single bill for the service and the customer must allocate charges among its business units (or, in the case of a reseller, among its own customers) and "re-bill" the charges. Under the "multi-location billing" option, AT&T performs this function. Pet'r Br. at p. 8 nn. 10-11. Multi-location billing is of considerable value to the customer and imposes significant costs on the carrier. Yet AT&T explains that "*Neither of these options is described in the tariff, for no separate charge is imposed for either option.*" Pet'r Br. at p. 8 (emphasis added).

[28] AT&T's Comments on AT&T Tariff 12 Issues on Remand, *AT&T Communications; Revisions to Tariff F.C.C. No. 12*, CC Docket No. 87-568, Affidavit of Dennis Lewis at ¶¶ 6, 13 (filed Mar. 4, 1991) ("Lewis Affidavit"). AT&T's Tariff 12 was challenged by competing carriers as unlawfully discriminatory in violation of Section 202(a) of the Communications Act. After its initial order upholding Tariff 12 was reversed on appeal, *MCI Telecom. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), the Commission opened a proceeding on remand. Mr. Lewis' affidavit, which was filed in that proceeding, was intended to demonstrate that AT&T's Tariff 12 offering was a response to unique customer demands. The Commission's subsequent order again rejected challenges to Tariff 12, and was affirmed on appeal. *See* note 4, *supra*.

- measurement of network availability and other performance standards on a network-wide basis
- management through a single point of contact for the entire customer organization
- certain levels of staffing support
- customized billing formats
- periodic network management reports
- procedures relating to opening and closing "trouble tickets" (*i.e.*, reports of service outages or other problems)
- the development and implementation of disaster recovery procedures
- procedures for "escalating" disputes up each party's management chain of command
- flexibility in responding to changes in the customer's business communications requirements

Mr. Lewis explained that AT&T took these customer requirements seriously, noting that "[T]hese customers were always very explicit that if AT&T was unable to provide the customized service they demanded, AT&T would lose the customer business to one of AT&T's competitors." [29]

Attached to this Brief as Appendix B are tables of contents from three contracts for interstate network services between large business users and leading interexchange carriers, edited only to remove all identifying information so as to comply with contractual confidentiality requirements. These documents demonstrate that the carriers do, in fact, seek to meet the customer requirements described in Mr. Lewis's affidavit. The Appendix contains a chart that correlates each of these customer requirements with provisions of the sample contracts. Because they do not affect the charges paid by the customers

[29] Lewis Affidavit, ¶ 8.

for service, these terms and conditions are not included in the carriers' tariffs.[30]

B. *AT&T Negotiates Contract Terms That Implement Its Tariffed Services and Represents To Its Customers That Such Terms Are Fully Enforceable.*

The major interexchange carriers (including AT&T) enter into contracts that address matters that, while not rate-affecting, are nonetheless crucial to the execution of the tariffed obligations of both carrier and customer.

AT&T's F.C.C. Tariff No. 12 illustrates the point. The tariff describes in detail the "virtual telecommunications network service" provided and sets out what charges will apply and under what circumstances. It does *not* address many matters that are crucial to the carrier/customer relationship but do not affect those charges. Section 7.2.10.A, for example, states that "Payment for [service] is due upon presentation of the bill. [Service] may be denied for nonpayment of a bill . . . ." Another section permits AT&T to deny service for nonpayment of charges due, requires AT&T to give at least five days'

[30] Judge Brunetti, dissenting in the case below, agreed with the majority that the "services" at issue in this case were not reflected in the applicable AT&T tariff, but concluded that the customer's claims could not be sustained because "AT&T is simply barred from contracting for non-tariffed services." *Central Office Tel., Inc. v. AT&T Corp.*, 108 F.3d 981, 994 (9th Cir. 1997) (Brunetti, J., dissenting). Judge Brunetti reached this (erroneous) conclusion based upon a case interpreting the ICA, which allowed transportation companies operating as common carriers to provide only those services for which rates had been tariffed. 108 F.3d at 995; *see* note 13, *supra*. Communications carriers are not similarly restricted. For example, all of the major interexchange carriers offer untariffed "enhanced" transmission services. *See Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 204 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 938 (1983) (Title II of the Act inapplicable to such services); 47 U.S.C. § 153(43) (defining "telecommunications" to exclude services classified as "enhanced"). AT&T (and its competitors) also manage communications networks for large customers. *See* www.att.com/solution and www.systemhouse.mci.com (information about AT&T's and MCI unregulated consulting and "outsourcing" services).

notice prior to denying service, and states that service will be restored upon payment of the charges. The tariff does not, however, explain when "presentation" occurs (when a bill is sent? upon the customer's receipt?), what constitutes a "bill" (how much detail? what format?) or what constitutes nonpayment of charges (may amounts disputed in good faith be withheld?). None of these items concerns the carrier's charges for service, although all are of importance to the parties. Under Section 203(a) of the Act, all of them may be addressed outside the tariff. And the enforcement of any off-tariff arrangement on these matters is not barred by Section 203(c).

AT&T argues that any aspect of the carrier/customer relationship that the tariff fails to address may be "filled in" only by "that which could be 'implied in the tariff' as a matter of federal law under principles of tariff interpretation: that is, to 'use diligence' and to act reasonably." Pet'r Br. at p. 34 (citations omitted). But "federal law" offers no meaningful guidance regarding the format or content of carrier invoices, appropriate procedures for their distribution to a customer's business units (or a reseller's customers), or other non-rate-affecting matters. The interpretation of Section 203(c) that AT&T urges here—that the carrier and the customer may not agree upon what constitutes "due diligence" or what it means for the carrier to "act reasonably"—contradicts AT&T's own practices.[31]

Decisions regarding which provisions of complex and comprehensive service agreements must be included in the carriers' tariffs are ultimately made by the carriers. When

[31] AT&T's argument also suggests that the Communications Act preempts state law claims, a proposition that is doubly unfounded. First, this Court has found complete preemption of state claims under only two federal statutes—Section 301 of the Labor Management Relations Act, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), and Section 502(a) of ERISA, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Second, such a reading would nullify the savings clause that Congress inserted in the Communications Act. 47 U.S.C. § 414.

pressed by their large customers to include more contract terms in the customized tariffs, the carriers often refuse on the grounds that the terms are not rate-affecting and that they want to minimize the amount of information disclosed to competitors. But all of the major interexchange carriers —including AT&T—have responded to customer concerns about the enforceability of non-tariffed terms by representing that the contracts are valid and binding as written, that the non-tariffed terms are fully enforceable by both parties, and promising to revise applicable portions of their tariffs in order to eliminate any conflict that may arise between a tariff provision and the contract.[32]

Insofar as the carriers negotiate provisions that offer "value" to the customer and impose some "cost" on the carrier, AT&T's arguments would effectively render them unenforceable. If the Court now adopts AT&T's view of the law, large customers will be in the position of having committed to purchase tens or hundreds of millions of dollars of telecommunications services based upon reciprocal commitments that the carriers will (arguably) no longer be required to meet.

C. *The Broad View Of The Filed Rate Doctrine Advocated By AT&T Here Contradicts AT&T's Prior Statements To The Federal Communications Commission.*

AT&T has, on several occasions, addressed the scope of the filed rate doctrine (and/or the companion tariff-filing requirement) before the FCC. In each instance described below, it has urged the agency to adopt a construction that is narrower than it now advocates to this Court.

In 1990, the Commission opened a proceeding to examine whether changes in its rules were appropriate in light of the burgeoning competition in the interstate interexchange marketplace. One of the issues addressed was

[32] *See* Sections entitled "Valid, Binding, Enforceable" and "Construction" in the tables of contents contained in Appendix B.

whether to permit AT&T and other interexchange carriers to offer services by means of individually negotiated arrangements, so long as the rates and rate-related terms thereof were filed in tariffs as required by Section 203(a) of the Act.[33] Although AT&T supported the "contract tariff" proposal, it opposed the Commission's initial plan to require carrier/customer contracts to be filed with the agency. AT&T argued that such a requirement would be "an . . . unwarranted departure from current practice" and unnecessary in light of the fact that such contracts may contain provisions that "do not relate to rates for telecommunications services or classifications and practices affecting such rates [including] provisions addressed to collocation . . . implementation plans and billing procedures." [34]

In response to the inclusion of forbearance authority in the newly-enacted Telecommunications Act of 1996,[35] the Commission proposed to require all providers of interexchange services who lack "market power" to withdraw their tariffs for domestic services.[36] AT&T urged the agency to adopt a "permissive" approach instead, under which carriers could choose whether or not to file tariffs. In response to concerns about the operation of the filed rate doctrine under such a regime, AT&T told the Com-

[33] *Interexchange Competition Order*, 6 F.C.C.R. at 5897-5903.

[34] Comments of American Telephone and Telegraph Co. at pp. 64-65 & n.*, *Competition Rulemaking*, 6 F.C.C.R. 5880 (filed Jul. 3, 1990). Collocation refers to the placement of customer equipment in carrier switching facilities. Needless to say, it is of considerable value to customers and imposes costs on carriers.

[35] 47 U.S.C. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that [three enumerated conditions are met].")

[36] *See Detariffing Order*, 11 F.C.C.R. at 20732. AT&T falls within this category. *See Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier*, note 25, *supra*.

mission that the doctrine is "not a talisman that trumps all contractual agreements" and that it would not apply to any matters that are lawfully addressed in off-tariff arrangements.[37] By that test, matters that are lawfully addressed in contracts—implementation plans, billing procedures, and the many other matters described in Section II.A above—would not fall within the scope of the filed rate doctrine.

In *The People's Network, Inc., v. American Tel. & Tel. Co.*,[38] the FCC's Common Carrier Bureau ruled on a formal complaint brought by a reseller of AT&T's SDN and other services. The customer claimed, *inter alia*, that AT&T had violated Section 203(a) of the Act by failing to reflect tariff limitations on the number of orders that it would process each month for an SDN customer or each week for a Distributed Network Services customer. According to the Bureau, "AT&T responded to this claim by arguing that its order limits do not affect the charges applicable for its services and that Section 203(a) therefore does not require their inclusion in the tariff." [39] The number of orders that a carrier will agree to process in any single month or week from a customer is a matter of great value to the customer and, most likely, a cost item to the carrier. Indeed, it is of a piece with assurances concerning the timeliness of installations once a carrier has

[37] Letter from J. Argentieri, note 24, *supra* and Appendix A. *See also* AT&T Corp. Petition for Limited Reconsideration and Clarification, *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 at p. 16 (filed Dec. 23, 1996) (urging extension of permissive detariffing to the international portions of integrated customer-specific offerings so as to avoid the confusion that would result if part of the agreement was subject to the filed rate doctrine and part was not).

[38] 1997 FCC LEXIS 1928 (Common Carrier Bur. rel. Apr. 10, 1997).

[39] *Id.* at ¶ 33. The Bureau agreed with AT&T's reading of Section 203(a) and rejected the customer's claim.

accepted an order. Yet, in *The People's Network*, AT&T successfully argued that such matters are not rate-affecting.

III. The Court Should Not Expand The Filed Rate Doctrine Beyond What The Statute Requires.

The language of Section 203(c) of the Communications Act, as well as the crucial distinction between it and the tariff provisions of the ICA, offer ample grounds on which to decline AT&T's invitation to adopt an expansive view of the file rate doctrine as it applies to interstate telecommunications. Important considerations of policy and recent developments in the way in which communications are marketed offer additional support for a narrow reading of the doctrine.

A. *The Doctrine Should Not Be Broadened In Light Of The Harsh Effects Acknowledged By The Federal Communications Commission And The Courts That Have Applied It.*

Regulated carriers often claim that the filed rate doctrine is beneficial for customers and for that reason (and others) should be nurtured by the Commission and the courts and broadly construed.[40] Customers, however, have found that the doctrine is most commonly invoked to their detriment, and the Commission has emphatically agreed:

> [W]e reject carriers' arguments that the "filed-rate" doctrine benefits customers by creating certainty in the carrier-customer relationship. In fact, the "filed rate" doctrine creates uncertainty in the carrier-customer relationship. Invocation of the "filed rate" doctrine can be especially harmful to consumers who have signed long-term service contracts with interexchange carriers . . . . [T]he doctrine permits interexchange carriers to subsequently file a tariff that differs from the long-term contract, and if justified by substantial cause, unilaterally to alter or abrogate their contractual obligations in a manner that is not available in most commercial relationships and that undermines consumers' legitimate business expectations. The "filed-rate" doctrine also harms residential and small business consumers who utilize mass market services and do not enter into long-term service arrangements. Such customers may purchase these mass market services in response to representations made by sales agents of the interexchange carrier or advertisements. In addition, such customers may assume the interexchange carrier will not modify its rates without actual notice to the customer. In the event of a dispute about the representations made by a sales agent, or a subsequent modification to an interexchange carrier's rates, terms, or conditions without actual notice to customers, a customer would be bound by the tariffed rates, terms, and conditions.[41]

Several courts, and the dissent below, have acknowledged that the doctrine frequently works a fundamental unfairness on customers. *See* 108 F.3d at 999 (Brunetti, J., dissenting); *see also Louisville & Nashville R. R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (filed rate doctrine "may work hardship in some cases . . . ."); *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 435-36 (4th Cir. 1989). This argues against an interpretation of the doctrine that encompasses all aspects of the legal relationship between carrier and customer.

As the Court is aware, its decision several years ago in *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and subsequent developments in the trucking industry have spawned a series of cases applying the filed rate doctrine under the Motor Carrier Act. *See, e.g., ICC v. Transcom Line*, 513 U.S. 138 (1995); *Reiter v. Cooper*, 507 U.S. 258 (1993). Some lower Federal courts, with a nod to *Maislin* and other ICA cases, have been deciding Communications Act cases in a manner

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[40] *See, e.g.*, USTA Br. at pp. 5-7; Petition of Frontier Communications for Reconsideration, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 at p. 5 (filed Dec. 23, 1996) ("The filed rate doctrine is beneficial to consumers.").

[41] *Detariffing Reconsideration Order* at ¶ 13 (footnotes omitted).

that is not only harsh for customers but, more importantly, unwarranted under Section 203(c) of the Communications Act. These decisions adopt sweeping formulations of the filed rate doctrine that shield carriers from liability for arguably actionable conduct on non-rate-affecting matters with no analysis of whether the subject provisions are rate-affecting. *See, e.g., Pay Phone Concepts, Inc. v. MCI Telecom. Corp.*, 904 F. Supp. 1202, 1207 (D. Kan. 1995) (a billing dispute is subject to the mandatory arbitration clause in the carrier's tariff, which "exclusively controls the rights and liability" between carrier and customer); *Fax Telecommunicaciones v. AT&T*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (no liability can arise from a carrier's failure to file a contract tariff as promised and that the customer victimized by the carrier's failure to file must pay standard rates). By adopting a view of the filed rate doctrine that is grounded firmly on the text of the Communications Act, as opposed to some other statute, this Court could (and should) clarify the role and operation of the filed rate doctrine and give appropriate direction to lower courts called upon to adjudicate carrier/customer disputes.

B. *The Filed Rate Doctrine Should Not Be Broadened In Light Of The History Of Communications Carriers Abusing Their Perceived Rights Under It.*

Among the important public benefits allegedly served by the filed rate doctrine is that it "enable[s] the existence of reasonable and non-discriminatory rates and services, avoid[s] situations of unequal bargaining power between carriers and consumers [and] minimize[s] unnecessary confusion on the part of both carriers and consumers." USTA Br. at pp. 5-6. In truth, the doctrine gives carriers the upper hand, for it effectively permits a carrier to make whatever promises it considers necessary to secure a customer's commitment and then file tariffs that fail to reflect those promises—all with the assurance that the tariffed terms will prevail in any dispute.[42] Nor does the doctrine

[42] *See* 952 F. Supp. at 954.

ensure that customers understand and agree to be bound by filed rates and terms. The record in the Commission's recent *Detariffing* proceeding is replete with tales of misleading representations by carrier personnel.[43] Several examples of the carriers' willingness to take unfair advantage of the filed rate doctrine illustrate the scope of potential abuse.

In August 1993, AT&T filed Contract Tariff No. 383 for an individual customer. The following month, AT&T filed an amendment significantly limiting the application of certain usage credits under the Contract Tariff. Three new customers had submitted orders for the offering prior to the effective date of the tariff amendment and protested to the Commission, citing AT&T's failure to seek their approval before making material adverse tariff changes. They withdrew their protests only after AT&T agreed to permit them to take service under the tariff as it had existed at the time their orders were placed.[44]

In 1994-95, MCI filed several modifications to its tariff that were adverse to customers with long-term service arrangements; those changes were made without the consent (or even the knowledge) of MCI's customers. The first modification doubled the charge for early termination of certain contracts.[45] The second modification involved the addition of a provision that automatically renews certain

[43] Petition for Further Reconsideration by Telecommunications Research and Action Center and Consumer Federation of America, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61 at p. 3 (filed Dec. 4, 1997).

[44] These events are recounted in *AT&T Communications, Apparent Liability for Forfeiture & Order to Show Cause*, Notice of Apparent Liability for Forfeiture & Order to Show Cause, 10 F.C.C.R. 1664 (1995).

[45] Prior to the amendment, a customer was liable for any commitment applicable to the year in which the termination occurred, plus an amount equal to 35% of the commitments for the remaining years of the term. The amendment required the customer to also repay any promotional credits previously received. MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.183752.

multi-year service arrangements unless the customer "provides written notification to cancel the [plan], which must be received by MCI not less than 30 days prior to the expiration of the term."[46] Customers who negotiated such arrangements with MCI that neither stated nor implied that a customer was required to give notice of its intent *not* to renew now face the threat of substantial penalties if they want to exercise their bargained-for right to change carriers at the end of the service term. At about the same time, MCI also added rules for arbitrating payment disputes that expressly deny customers the right to a copy of their bills, deprive arbitrators of authority to prevent MCI from suspending service while the arbitration is pending, and require customers, as a condition of taking service, to waive their statutory right to a Commission or court determination of the lawfulness of MCI's charges.[47] In yet another filing, MCI modified its tariff provisions relating to toll fraud so as to make its customers strictly liable for all unauthorized use occurring after either the customer notifies MCI or MCI notifies the customer of suspected fraud.[48] This shift of all liability to the customer would abrogate any commitment previously made by MCI to carry out customer-requested call blocking to minimize fraud.

Recently, carriers have cited the filed rate doctrine in defense of their efforts to unilaterally raise the rates payable under negotiated, fixed-fee service arrangements.

[46] MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.3.18372.

[47] MCI Telecommunications Corp., Tariff F.C.C. No. 1, §§ B.7.1353, B.7.13811-13812. The tariff allows MCI to compel arbitration of all disputes in excess of $10,000 under the auspices of J.A.M.S./ENDISPUTE. MCI Telecommunications Corp. Tariff F.C.C. No. 1, § B.7.13. Last year, pre-trial discovery in *MCI Telecom. Corp. v. Matrix Communications Corp.*, Civ. No. 96-11975-EFH (D. Mass.) disclosed that MCI has a contract with that organization for the provision of litigation support services in connection with arbitrations involving MCI and its customers. That fact is not disclosed to customers in the MCI tariff.

[48] MCI Telecommunications Corp., Tariff F.C.C. No. 1, § B.4.102.

A series of Commission rulings has imposed certain new costs on interexchange carriers, at the same time that it has mandated decreases in other costs.[49] The major carriers have sought to pass the cost increases (but not the cost decreases) on to their customers despite agreements contained in tariffs and contracts capping the applicable rates at the negotiated levels. Some carriers have taken this stance even in connection with agreements signed *after* the Commission adopted the orders that gave rise to the cost changes. In other words, each such carrier has proposed more favorable rates than its competitors, won the customer's business, bound the customer to a multi-year multi-million-dollar commitment, and then raised those rates based upon factors that were known to the carrier when it made its bid and signed the contract. When challenged by irate customers, the carriers reply that the filed rate doctrine requires the customer to pay the new tariffed rate!

Effectively free from regulatory oversight, yet assured that whatever clauses they put in tariffs will "trump" their contracts even if users are not told of (and do not consent to) the new provisions, interexchange carriers have become increasingly willing to insert one-sided terms in their tariffs. The filed rate doctrine shields such behavior when

[49] For example, the Commission has ordered carriers to compensate operators for each call for toll-free long distance call made from a payphone. *Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20541 (1996), *recon.*, 11 F.C.C.R. 21233 (1996), *aff'd in part, vacated in part sub nom. Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555, *clarified*, 123 F.3d 693 (D.C. Cir. 1997). *See also, Federal-State Joint Board on Universal Service*, Report and Order 12 F.C.C.R. 8776 (1997) (carrier contributions to a Universal Service Fund); *Access Charge Reform*, First Report and Order, FCC 97-158, (1997), *appeal docketed sub nom. Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir.) (increasing per-line charges for connection to local exchange networks); and *Price Cap Performance Review for Local Exchange Carriers*, Order, 12 F.C.C.R. 10175 (1997), *appeal docketed sub nom. United States Tel. Ass'n v. FCC*, No. 97-1469 (D.C. Cir.) (reducing usage-based access charges).

it involves rates or rate-affecting terms, but this Court should not needlessly extend that shield to a broader range of carrier behavior.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court interpret the Communications Act's tariffing provisions as they are written.

Respectfully submitted,

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February 20, 1998

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APPENDICES

APPENDIX A

[AT&T Logo]

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July 17, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Ex Parte Presentation*—CC Docket No. 96-61

Dear Mr. Caton:

Today AT&T provided copies of the attached document to Richard Welch, Chief, Policy Division, Common Carrier Bureau, and to Melissa Waksman, Christopher Heimann, Jordan Goldstein, and Patrick DeGraba, also of the Policy Division of the Common Carrier Bureau.

Two copies of this Notice, along with the attached letter, are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

/s/ Judy Argentieri

Attachment

cc: R. Welch
M. Waksman
C. Heimann
J. Goldstein
P. DeGraba

AT&T Ex Parte Presentation—CC Docket No. 96-61

Permissive Detariffing And The Filed Rate Doctrine

Although a majority of commenters in CC Docket No. 96-61 support *permissive* detariffing, a few commenters continue to support mandatory detariffing,[1] at least for negotiated service arrangements, based on the purported concern that unless detariffing were mandatory, carriers could continue to file tariffs and invoke the filed rate doctrine to make unilateral changes to carrier-customer deals. A brief analysis of the filed rate doctrine, however, makes plain that this "problem" is chimerical. The filed rate doctrine is a product of a specific legal regime—a regime of mandatory tariffs—not a talisman that trumps all contractual agreements. As explained below, under a *permissive* detariffing regime, a written contract could specify that it is controlling over subsequent tariff filings, and the customer could then assert the contract as a defense to any claim based on such filed tariffs.

The filed rate doctrine was the product of two interrelated subsections of the Interstate Commerce Act (ICA). First, the ICA required that carriers make public filings disclosing their rates. Second, and correlatively, carriers were prohibited from charging or collecting any rates other than filed rates. These two requirements served as the model for Sections 203(a) and (c) of the Communi-

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[1] As explained in its comments in this docket, and in its July 10, 1996 *ex parte*, AT&T does not believe that the Commission may lawfully order mandatory detariffing, for two reasons. First, the Commission's authority under Section 10 permits it to refrain from requiring tariffs, but does not extend to prohibiting the filing of tariffs. Second, because the record establishes that mandatory detariffing would impose enormous costs on carriers and customers, particularly with respect to casual calling and services provided to residential and small business customers, with no countervailing benefits that could not be achieved through permissive detariffing, a mandatory detariffing rule would not be "in the public interest."

cations Act.[2] The purposes of the tariff requirements of both the ICA and the Communications Act were "to render rates definite and certain, and to prevent discrimination and other abuses"[3] by ensuring that all customers paid the same charges—the filed rate—for the same service. In numerous decisions, the Supreme Court construed these requirements to mean that "the rate of the carrier duly filed is the only lawful rate."[4]

The Supreme Court's decisions make clear that that the filed rate doctrine necessarily derives from the requirement that all rates be filed. The sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory. As the Supreme Court explained in *Maislin*, allowing a carrier to charge other than filed rates would "render nugatory" the statutory requirement that all rates be filed.[5] The filed rate doctrine thus reduces to a syllogism: If a rate must be filed in order to be valid, then unfiled rates cannot be valid.

By exercising its statutory forbearance authority to adopt permissive detariffing, the Commission would eliminate the major premise of the syllogism—the requirement that all rates be filed. Valid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts. There is simply no basis for the assertion that the filed rate doctrine would vitiate contract rates in a permissive detariffing scheme. A carrier that had agreed to rates in an unfiled contract could no longer claim that the filed rate was the "only lawful rate."

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[2] *MCI v. AT&T*, 114 S. Ct. 2223, 2231 (1994).

[3] *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (citing *Arizona Grocery Co. v. Atchison, T. & S.F.R.R. Co.*, 284 U.S. 370, 384 (1932)).

[4] *E.g., id.* at 127, *quoting Louisville & Nashville RR Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

[5] *Maislin*, 497 U.S. at 132.

Indeed, the courts have recognized that where the statute at issue, or the agency acting within its statutory authority, permits rates and other terms of service to be established other than through filings with the agency, the filed rate doctrine does not apply.[6] Thus, in *Maislin*, the Supreme Court invalidated the Interstate Commerce Commission's (ICC) "Negotiated Rates" policy based on its conclusion that the ICC had no authority to abrogate the ICA's requirement that all rates be filed. Conversely, the court's opinion makes clear that the Negotiated Rates policy could have been sustained had the ICA given to the ICC the forbearance authority which Congress has now given to the Commission in Section 10.[7]

It has nevertheless been suggested that in a permissive detariffing regime, a carrier could "voluntarily" file and attempt to enforce a tariff against a customer with which the carrier had previously entered into a written agreement providing that the contractual terms would control over any inconsistent tariff provisions. This argument, which is based on the language in Section 203(c) requiring that a carrier charge and collect its filed rates, ignores the fact that the Commission's Section 10 forbearance authority extends to Section 203(c) no less than to Section 203(a). Indeed, Section 203(c) itself provides that its requirement that carriers collect their filed rates is inapplicable where "otherwise provided by or under the authority of this Act."

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[6] *See Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981) (recognizing that carrier must charge and collect the filed rate, "[e]xcept when the Commission [validly] permits a waiver"). In a later proceeding in *Arkansas Louisiana*, the Fifth Circuit observed that the Supreme Court's decision in that case "clearly recognized that the waiver provisions of [15 U.S.C. § 717(d) authorized] the Commission to waive the usual requirements of timely filing of an alteration in a rate." *Hall v. FERC*, 691 F.2d 1184, 1189 (5th Cir. 1982) (quotation omitted). Accordingly, *Hall v. FERC* expressly noted that the filed rate doctrine would not bar exercise of FERC's waiver authority. *Id.*

[7] *Maislin*, 497 U.S. at 133-35.

If the Commission were to exercise its authority under new Section 10 to forbear from enforcing Sections 203(a) and 203(c) when a carrier and a customer have entered into an unfiled written agreement, and thereby adopt permissive detariffing, a carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of their deal.[8]

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[8] Permissive detariffing would operate in a manner analogous to the role of the Uniform Commercial Code in contracts for the sale of goods. Parties to such contracts may specify that the "default" provisions in the UCC do not govern their relationship, and instead may specify alternative terms. Similarly, carriers and customers may provide that any or all of the terms in the contract apply in lieu of otherwise applicable tariff provisions.

APPENDIX B

(Sample Tables of Contents)

Topic	Sample #1	Sample #2	Sample #3
Performance standards; procedures for reporting and tracking outages	§§ 2.6, 2.13, 2.18, 5.5, 14.1, 14.3	§§ 2.7, 2.9, 2.16, 4.6, 5.4, 14.1, 14.3, Attachment PS	§§ 2.6, 2.8, 2.10, 2.19, 4.4, 5.5, 14.2, 14.3, Attachments AC and PS
Requirements for vendor staffing	§§ 3.1, 3.2	§§ 3.1-3.3, 8.6	§§ 3.1-3.4, 8.7, Attachment KP
Requirements for carrier invoices	§§ 2.9, 2.10, 5.4	§ 2.10, 5.5, Attachment BI	§§ 2.11, 2.12, 5.6, Attachment BI
Network management services, reporting	§ 2.14, Attachment NM	§ 2.11, Attachment NM	§ 2.14, Attachment NM
Disaster recovery procedures	§ 2.15	§ 2.14, Attachment DRP	§ 2.17
Informal dispute resolution		§ 15.8	§ 15.12
Arbitration	§ 15.12	§ 15.9	
Obligations relating to changes in customer requirements	§§ 2.4, 2.5, 2.12, 4.1-4.2, 5.2, 5.3	§§ 2.4, 2.5, 2.12, 4.1-4.5, 5.2, 5.3	§§ 2.4, 2.5, 2.15, 4.1-4.5, 5.3, 5.4

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ATTACHMENTS

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